



STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL

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February 17, 2009

Via U.S. Mail & Facsimile (916) 322-6440

Chairman Johnson and Commissioners
The Fair Political Practices Commission
428 J Street, Suite 800
Sacramento CA 95814

Re: February 19, 2009 Agenda Item #19 – Adoption of Regulation 18215.3
and Approval of Form 803: Behested Payment Reports

Dear Chairman Johnson and Commissioners:

This letter requests a modification of the proposed instructions for Form 803. Attorneys in this office have concluded that an illustration in these instructions is premised upon an incorrect interpretation of the law governing "behested payments." This illustration should be deleted and the instructions should be modified to clarify that behested payments made from government entities and 501(c)(3) organizations are presumptively non-political and, therefore, non-reportable.

As you know, the Political Reform Act generally requires candidates (including elected officers) to disclose campaign contributions. (See generally Government Code § 81000 et seq.)¹ Section 82015 defines "contribution" and creates a presumption that a payment made by an entity at the behest of a candidate is a contribution to that person unless the payment is made in return for full and adequate consideration from the candidate, or the payment is made for a presumptively nonpolitical purpose. (§ 82015, subd. (b)(2).)

The statute then specifies three presumptively nonpolitical purposes:

- (i) the payment is made principally for a personal purpose, in which case it is a "gift" and may be reported as such;
- (ii) the payment is made by a governmental entity or a 501(c)(3) entity; and,

¹ All further statutory references are to the Government Code unless otherwise noted.

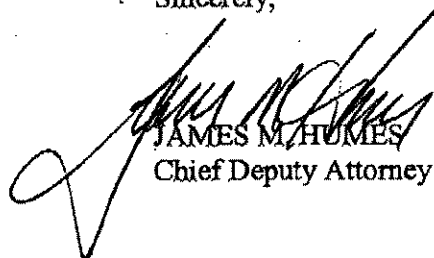
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- (iii) the payment, not covered by clause (i), is made by any other person or entity for a legislative, governmental or charitable purpose. These payments are not a contribution to the candidate, but may be reportable as behested payments. (See § 82015, subd. (b)(2)(B)(i) – (iii).)

The Commission is apparently reading the statute to suggest that payments by governmental entities and 501(c)(3) organizations that are behested by an elected officer may be reportable.² We reach this conclusion because of an example provided in the proposed instructions to proposed Form 803. In the example, a state Senator requests that a 501(c)(3) organization sponsor a solar technology fair. The example shows how such a request would be reported and presumes that the request is a “behested payment” reportable pursuant to section 82015, subd. (b)(2)(iii). The presumption implies that payments behested from a governmental agency would also be reportable since payments from governmental entities and 501(c)(3) organizations are both enumerated in subsection (ii). If this were true, elected officials could be required to report government-to-government grants and cooperative operations, such as a grant to a state department from the federal government, a multi-county drug or gang task force, or a federal-state partnership. We believe that such a reading is contrary to the plain language of the statute,³ is inconsistent with legislative history, and would lead to absurd results.

Accordingly, we urge the Commission to modify the proposed instructions to reflect a proper reading of section 82015, subdivision (b)(2)(B). Specifically, we ask the Commission to make it clear that behested payments made from government entities and 501(c)(3) organizations are presumptively non-political and, therefore, non-reportable.

Sincerely,


JAMES M. HUMES
Chief Deputy Attorney General

JMH:cb

² Indeed, the Commission has taken this position in the past. (See CA FPPC, No. A-97-623(a), fn. 10.)

³ Any uncertainty about the statute arises from the language expressly exempting “gifts” from the behested payment requirements (exclusion of clause (i) in clause (iii)). The legislative history demonstrates that the purpose of this exclusion was to avoid a situation in which a person could make a payment that should be a reportable “gift,” but avoid the gift rules by arguing that the payment was actually made “principally” for a legislative, governmental, or charitable purpose.